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Christopher M. Goff (27839)			DAGNEW, SABA	
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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES

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8 *Ex parte* THOMAS ODORZYNISKI

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11 Appeal 2010-004574
12 Application 10/748,715
13 Technology Center 3600

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16 Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and
17 BIBHU R. MOHANTY, *Administrative Patent Judges.*
18 FETTING, *Administrative Patent Judge.*

19 DECISION ON APPEAL

1 STATEMENT OF THE CASE¹

2 Thomas Odorzynski (Appellant) seeks review under 35 U.S.C. § 134
3 (2002) of a final rejection of claims 1,3-8,10-18,20,22,24-29, and 31-33, the
4 only claims pending in the application on appeal. We have jurisdiction over
5 the appeal pursuant to 35 U.S.C. § 6(b) (2002).

6 The Appellant invented a way of using diapers as an advertising medium
7 (Specification 1:21-22).

8 An understanding of the invention can be derived from a reading of
9 exemplary claim 1, which is reproduced below [bracketed matter and some
10 paragraphing added].

11 1. A method of advertising, the method comprising:
12 [1] selling space on a disposable diaper to a sponsor; and
13 [2] placing an ad for a product other than disposable diapers
14 onto the disposable diaper.

15 The Examiner relies upon the following prior art:

Gabler	US 5,481,758	Jan. 9, 1996
Iwamoto	WO 03/028496 A1	Apr. 10, 2003

16 Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 stand rejected
17 under 35 U.S.C. § 102(b) as anticipated by Gabler.

¹ Our decision will make reference to the Appellant's Appeal Brief ("App. Br.", filed September 11, 2009) and Reply Brief ("Reply Br.", filed January 13, 2010), and the Examiner's Answer ("Ans.", mailed December 9, 2009).

¹ Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto².

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ISSUES

The issue of anticipation turns on whether a diaper is an undergarment.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

10 *Gahler*

11 01. Gabler is directed to a garment having a message on the outer
12 surface. Gabler 1:9-10.

13 02. Gabler describes how its messages are not limited to outer
14 garments but can also be applied to clothing normally seen only in
15 private including underwear. Gabler 2:57-60.

¹⁶ 03. Gabler's Fig. 3 displays a commercial message, implying the
¹⁷ space for the message was sold as advertising.

18 Iwamoto

² Although the heading for this rejection excludes claim 33, the analysis for the rejection of claim 33 is included under this heading in both the Final Rejection and Answer. We take the omission from the heading as a typographic error.

04. Iwamoto is directed to a novel advertising medium using a detachable advertisement display for clothing. Iwamoto Abstract.

ANALYSIS

Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 rejected under 35 U.S.C. § 102(b) as anticipated by Gabler.

7 We are unpersuaded by the Appellant’s argument that Gabler fails to
8 describe a disposable diaper. Appeal Br. 4-6. Gabler describes applying
9 messages to undergarments such as underwear. This is clearly a genus for
10 which disposable diapers would be a species. Whether disposable diapers
11 are constructed differently than other forms of underwear as the Appellant
12 contends is not pertinent to the issue of whether a diaper is a garment worn
13 under other clothing. Similarly, whether the means for attaching a message
14 would be structurally different for diapers as the Appellant contends is not
15 pertinent as no means is claimed and the claims do not recite attachment, but
16 merely placement onto the diaper.

17 We are also unpersuaded by the Appellant's argument that MPEP
18 § 2131.02 states that a description of a genus does not necessarily anticipate
19 a species. Reply Br. 2. There are a limited number of types of
20 undergarments, compared to the many variations of chemical formulas cited
21 in MPEP § 2131.02. Accordingly, one would have immediately envisaged
22 diapers as among those garments worn under clothing by extremely young
23 children.

1 *Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 rejected under 35 U.S.C.*
2 *§ 103(a) as unpatentable over Gabler and Iwamoto.*

3 We are unpersuaded by the Appellant's arguments that art fails to
4 describe the claimed structure of a disposable diaper. As the Examiner
5 found, the structure does not affect one's ability to simply place a message
6 somewhere upon a diaper, and the structure recited of an absorbent pad,
7 bodyside liner, and liquid impermeable backsheet, is known by ordinary
8 consumers, much less those of ordinary skill, to be that of many
9 conventional disposable diapers.

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11 CONCLUSIONS OF LAW

12 The rejection of claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and
13 32 under 35 U.S.C. § 102(b) as anticipated by Gabler is proper.

14 The rejection of claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 under
15 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto is proper.

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17 DECISION

18 To summarize, our decision is as follows.

- 19 • The rejection of claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and
20 32 under 35 U.S.C. § 102(b) as anticipated by Gabler is sustained.
- 21 • The rejection of claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 under
22 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto is
23 sustained.

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¹ No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv) (2007).

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AFFIRMED

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